

No. 2473

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

UNION STEAMSHIP COMPANY (a corporation), claimant of the American Steamship
“Argyll”, her engines, boilers, etc.,
Appellant,
vs.
KONSTANT LATZ,
Appellee.

BRIEF FOR APPELLANT.

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McCUTCHEON, OLNEY & WILLARD,
Proctors for Appellant.

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Statement of Facts.

This appeal requires the determination of the faults which brought about a collision between the oil tanker "Argyll" and the steam schooner "Gualala." The collision occurred, on a clear night, at about three A. M. of October 15th, 1912, between Point Reyes and Point Arena, on the coast of California, while the "Argyll", a steamship 320 feet in length, loaded with gasoline, was steaming northward, steering N. W. $\frac{1}{4}$ W. and the "Gualala", a steam schooner 120 feet long, loaded with ties and tan bark, was proceeding southward, steer-

ing S. E. The vessels came together about 30° from head on, the "Argyll" striking the "Gualala" on the latter's port bow, approximately eleven feet abaft her stem.

The two versions of the primary cause of collision, given by the officers and crews of the two vessels, were diametrically opposed to each other. In brief, that of the "Gualala's" witnesses was that while she was proceeding on a S. E. course, her first officer, Gibbs, in charge of her navigation, saw the range lights of the "Argyll" about one and one-half miles ahead, bearing approximately one and one-half points on the "Gualala's" port bow; that he next saw the "Argyll's" port (red) side light, and, thereupon, blew a one blast passing whistle, which he says was answered by the "Argyll", and ordered the "Gualala's" helm a'port; that she swung off one and one-half points to S. E. by S. $\frac{1}{2}$ S.; that half a minute later he ordered the helm hard a'port, and then in 25 or 30 seconds, when the "Gualala" was heading S. S. W., he reversed full speed astern, and the collision occurred a minute afterward. The reversing of the engine when the "Gualala" was heading S. S. W. is stated by Gibbs to have been induced by the fact that the "Argyll's" green light suddenly, at that moment, came in view, two points on the "Gualala's" port bow, indicating that the "Argyll" was attempting to cross the course of the "Gualala", contrary to the exchanged passing signals. These changes of courses were plotted by Gibbs as libelant's Exhibit "A", a copy of which, reduced in size, has been appended to this brief for convenient reference.

The original exhibit has been transmitted to the clerk of this court.

On the part of the "Argyll", it is contended by her witnesses that the "Gualala's" range lights were first observed about one and one-half points on the "Argyll's" starboard bow, and that immediately thereafter the former's green light was seen, the green lights and not the red lights thus being exposed to each other; that, shortly afterward, the "Gualala" blew a one blast passing signal, ported her helm, and turned across the course of the "Argyll", exposing to the latter both of her side lights, then shutting out her green light, and leaving her red light alone; that, thereupon, in an effort to swing her clear of the "Gualala", the "Argyll's" helm was put hard a'port, the alteration of helm being denoted by a one blast passing signal, and her engines were instantly reversed full speed astern, such reversing being indicated by three blasts on the "Argyll's" whistle; that instead of swinging clear, however, the vessels came together at the angle stated.

It is thus certain that one version, or the other, of the collision is wrong. It is manifest that the two vessels could not approach each other starboard to starboard so as to expose green light to green light, as stated by the "Argyll's" witnesses, and be at the same time port to port so as to show red light to red light, as insisted by the "Gualala's" officers and crew.

It is equally positive that the "Argyll" could not turn to starboard under a port helm, as asserted by

her officers and crew, in compliance with her answer of one blast to the one blast passing signal given by the "Gualala", and at the same time turn to port under a starboard helm, in direct opposition to the passing whistles, as claimed by the "Gualala's" witnesses. Either, therefore, the vessels approached starboard to starboard, and each ported, in accordance with the exchanged passing signals, as stated by the "Argyll's" officers and crew, or they were port to port, and the "Gualala" ported as required by the passing signal, and the "Argyll" starboarded in violation of it, as contended by the "Gualala's" witnesses. *The determination of these controverted facts will fix the fault for the collision.*

The evidence in the cause was taken in open court, save that of the officer and crew of the "Gualala", in charge of her navigation, whose testimony, except that of the master not produced as a witness, was procured by deposition. Following the trial, the District Court rendered its decision, holding the "Argyll" solely at fault for negligence on the part of her lookout in not reporting the change of course by the "Gualala", and of the deck officer in not observing such alteration of course. The opinion, however, does not adjudge such changes by the test of proper navigation. It was in briefest form, and did not purport to review the navigation of the two vessels leading to the collision, save as to the want of diligence charged to the "Argyll's" lookout and deck officer. In fixing fault upon the "Argyll", however, the court impliedly found, though it did not so state, that the version of the

collision given by her officers and crew, was the true one, a fact which of itself necessitated the condemnation of the "Gualala" under two leading cases, one in the Federal Courts of the United States, and the other in the English Court of Appeal and the House of Lords. Notwithstanding the court had these authorities before it, no mention was made of the rule promulgated by them, and no effort was exerted to distinguish their application, or to show any reason why the "Gualala" did not merit condemnation for doing that which they held to be improper navigation. The result is that a complete review of the navigation of the two vessels is necessary to a full understanding of the cause of the collision.

This appeal is prosecuted from the decrees entered on the District Court's decision.

Specifications of Error.

Errors have been assigned, in the apostles on appeal, to the decree of the District Court, holding the "Argyll" solely at fault for the collision, as follows:

1. That the District Court erred in rendering the decree herein of date the 8th day of May, 1914, against the steamship "Argyll".
2. That the District Court erred in holding and deciding that the said steamship "Argyll" was in any way at fault in the collision with the steamship "Gualala".

3. That the District Court erred in holding and deciding that the steamship "Argyll" was in fault for inefficiency of the lookout in not reporting when the "Gualala's" red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone.

4. That the District Court erred in holding and deciding that the steamship "Argyll" was in fault because of negligence on the part of McAlpine, the deck officer, in not observing the "Gualala's" course, because of his failure to note when her red light and her green light were visible together and when her green light disappeared from view.

5. That the District Court erred in holding and deciding that the said steamship "Argyll" was in fault because of McAlpine's failure in observing the "Gualala's" red light until warned by her whistle.

6. That the District Court erred in holding and deciding that the steamship "Argyll" was in fault because of the fact that when the "Gualala's" light was first sighted, McAlpine contented himself with directing the quartermaster not to let her come any closer.

7. That the District Court erred in holding that seven minutes elapsed from the time the lookout reported the "Gualala's" light until the blowing of her whistle.

8. That the District Court erred in holding and deciding that the lookout and deck officer of said steamship "Argyll" were inattentive to their duties.

9. That the District Court erred in allowing libelant excessive damages.

10. That the District Court erred in not holding the steamship "Gualala" solely in fault for the collision between it and the said steamship "Argyll".

Inasmuch as the errors assigned present for determination *de novo*, the question of the proper navigation of both vessels, such navigation can best be considered in its causative relations to the collision.

Argument.

Three facts, material to the determination of the primary cause of the collision, are admitted:

1. That the "Gualala" blew a one blast passing whistle, and altered her course to starboard in accordance therewith.

2. That immediately thereafter the "Argyll" blew a similar whistle.

3. That the vessels came together about 30° from head on, at a time when the "Gualala" was heading S. S. W.

If the "Gualala" was on a S. E. course to starboard of the "Argyll", showing her green light to the latter when she blew the one blast passing whistle, then in altering her course to starboard in accordance with the signal, she committed fault in attempting to cross the bow of the "Argyll", and must be condemned under the high authorities hereafter cited.

On the other hand, if the vessels were port to port, exposing their red lights to each other, when the "Gualala" gave the passing signal and ported her helm, then the "Argyll" must have starboarded her helm instead of porting it, as the passing signals required, and she should be held in fault for attempting to cross the course of the "Gualala." Stripped of its unessentials, then, the case turns upon the question of the positions of the two vessels when the passing signals were given, and the direction in which the "Argyll" altered her course, for the ascertainment of those facts determines the vessel which committed the fateful error of attempting to cross the course of the other.

Certain it is that the vessels came together at about 30° from head on when the "Gualala" was heading approximately S. S. W. If, therefore, it can be demonstrated that the collision could not have so occurred if the two vessels were approaching port to port, red light to red light, by the "Gualala" porting her helm, and the "Argyll" starboarding hers, as the "Gualala's" witnesses claim, but could naturally have so resulted if they were starboard to starboard, green light to green light, and each ported in accordance with the exchanged signals, then no alternative exists to the court finding that the "Gualala" committed the primary fault by wrongfully attempting to cross the course of the "Argyll" when the vessels could and should have passed clear, as they were going, starboard to starboard. Indeed, such fact of course and change of course seems to have been found by the trial court,

but the latter failed to appreciate the legal fault which it involved, although it had been pointed out by at least two leading cases.

The Manitoba, F. C. 9029; 122 U. S. 154;
Stoomvart, etc., v. P. & O. St. Nav. Co., L. R.
5 A. C. 876.

The District Court found that the "Argyll" must be held responsible for the collision for the following reasons:

"1. For inefficiency of the lookout in not reporting when the 'Gualala's' red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone.

2. For negligence on the part of McAlpine, the deck officer, in not observing the 'Gualala's' course because of his failure to note when her red light and her green light were visible together, and when her green light disappeared from view; because of his failure to observe her red light until warned by her whistle; because of the fact that when the 'Gualala's' lights were first sighted, he contented himself with directing the quartermaster 'not to let her come any closer,' apparently paying no further attention to her until warned by her whistle when it was too late to avoid a collision."

When the vessels came in view of each other's side lights, either the "Argyll" was on the "Gualala's" port bow, showing her red light to the latter, as claimed by the officers and crew of the "Gualala", or the "Gualala" was off the starboard bow of the "Argyll", exposing her green lights, as contended by the "Argyll's" witnesses. No other positions are even suggested by those who were witnesses to the collision.

It is also certain that the "Gualala", upon blowing her one blast passing signal, ported her helm and swung to starboard. If, therefore, in so swinging, she opened both green and red lights to the lookout and deck officer of the "Argyll", and then shut out the green light and left her red light alone visible, as stated by the court, the "Gualala" must have been to starboard of the "Argyll"; for if she had been to port of the latter, so that the "Argyll's" red light was visible to the "Gualala" at about one and one-half points on the latter's port bow, *then, by her swinging to starboard under her ported helm, the "Gualala" would never have opened both lights to, and immediately afterward shut her green light out from, the "Argyll".* It would be simply a physical impossibility. When the trial court, then, found that "inefficiency" existed on the part of the lookout of the "Argyll" in not reporting when the "Gualala's" red light and green light were visible, and when he lost her green light and picked up her red light alone, *the court must have found, in his own mind, that the "Gualala" was approaching on the "Argyll's" starboard bow, as stated by the "Argyll's" witnesses, and not to port, as contended by the officers and crew of the "Gualala".* The same conclusion necessarily follows from the court's finding of negligence on the part of the "Argyll's" deck officer, in not observing the "Gualala's" change of course, and in not noting when her red light and her green light disappeared from view. *Those conditions simply could not be produced by a change of the "Gualala's" course to starboard, by a porting of*

her helm, if she had the "Argyll's" red light on her own port bow.

The finding of the defined "inefficiency" and "negligence" on the part of the officers and crew of the "Argyll", by the trial court, necessitated, therefore, a corresponding finding that the "Gualala", when on a course which would have passed the "Argyll" starboard to starboard, ported *her helm and attempted to cross the bow of the "Argyll", thereby precipitating the collision.*

Not only does the finding of the District Court force this conclusion, but the evidence adduced by the witnesses called on behalf of both vessels demonstrates it beyond peradventure as the only possible explanation of the collision. It is necessary, therefore, to a proper determination of the fault responsible for the collision, that all of the evidence be given due consideration, with careful reference to the illustrative drawings of the courses of the vessels, made by the witnesses, copies of which, proportionately reduced in size, are appended hereto.

GIBBS' STATEMENT AS TO THE COURSE OF THE "GUALALA."

The testimony of First Officer Gibbs of the "Gualala", who was in charge of her navigation, was that while the "Gualala" was proceeding at the rate of eight miles per hour, down the California coast, between Point Arena and Point Reyes, on a S. E. course (Ap. 280-282), he saw the range lights of the "Argyll"

about a mile and a half, or a mile and three-quarters, ahead, bearing about a point and a half on the "Gualala's" port bow (Ap. 261-2, 28), and, that thereupon, he blew one whistle (Ap. 288-9), and ordered his quartermaster to port his helm, which order was obeyed by changing the course to starboard, about one and a half points (Ap. 262, 286, 297). This was about three minutes before the collision (Ap. 287). That half a minute later he ordered the helm put hard a'port (Ap. 290), and 25 or 30 seconds afterwards, *he saw the green light of the "Argyll", bearing two points on his port bow* (Ap. 290), and thereupon reversed full speed astern (Ap. 290), and the collision took place approximately a minute thereafter (Ap. 290). At the time he first ported, one and a half points, the "Gualala" swung to S. E. x S. $\frac{1}{2}$ S. (Ap. 297), and *at the time he saw the green light, the "Gualala" was heading S. S. W.* (Ap. 265). Subsequently, he testified that *he knew "for a fact" the "Gualala" was heading S. S. W. just a few seconds before the collision, for he noticed the compass* (Ap. 316-317-8).

Not only did Gibbs so testify, but graphically indicated the various compass headings of the "Gualala" upon a drawing, showing the S. E. course (first position), and the direction S. S. W. ("Gualala" A), to which she had swung by the time of the collision, though his drawing did not pretend to show the exact course through which she traversed in swinging from S. E. to S. S. W. (Libelant's Ex. "A", copy appended; Ap. 268, 271, 301-302, 315-6, 317-8, 321, 322). Furthermore, the position "Gualala" A, on the drawing, was the

heading of the "Gualala" when Gibbs noticed the compass three or four seconds before the collision. As she was still going ahead on a hard a'port helm, it is manifest that she must have been heading even more to the westward at the moment of impact (Ap. 315-16, 317, 323-4).

Whatever the period elapsing between the time Gibbs first altered the course to starboard and the collision, *is stands as his statement, by which the "Gualala's" version of the collision is to be adjudged, that she had swung as far to starboard as S. S. W., from the S. E. course, four or five seconds before the collision.*

GIBBS' STATEMENT AS TO THE "ARGYLL'S" BEARINGS AND LIGHTS WAS ABSOLUTELY INCORRECT.

It is claimed by Gibbs that, *while he saw the "Argyll's" range lights one and a half points on his port bow when the "Gualala" was headed S. E., he did not alter the "Gualala's" course until he saw the "Argyll's" red light, when he ported one and a half points* (Ap. 262). *He first saw the "Argyll's" green light two points on his port bow, when the "Gualala" was headed S. S. W.* (Ap. 264-5).

Two points are thus fixed by Gibbs:

- (1) *The "Gualala" was heading S. E. when Gibbs saw the "Argyll's" red light one and a half points on his port bow.*

- (2) *The "Gualala" was heading S. S. W. when the "Argyll's" green light was first seen, bearing two points on his starboard bow.*

According to Gibbs' statement, the "Argyll's" red light was seen one and a half points on the "Gualala's" port bow, while the latter was heading S. E. Referring, for convenience, to the drawing made by Captain Curtis (Claimant's Exhibit "F", copy appended), this would place the "Argyll" somewhere along the line A-C while the "Gualala" was on the S. E. course A-B. If the "Gualala" was traveling at a speed of eight knots, she advanced 406 feet in half a minute, so that when she ported one and a half points in a half minute, she must have been approximately at the position 3, at the expiration of the half minute after porting (Ap. 225, 226-7). She was then headed S. E. x S. $\frac{1}{2}$ S. (Ap. 262, 286). As the "Argyll's" green light had not then come into view, it is manifest that the "Argyll" must have held to a course which kept her head above the line 3-C⁽²⁾, *for the moment her bow was on that course, her green light would have been seen* (Ap. 239-240, 236). Half a minute thereafter, Gibbs ordered his helm put hard a'port, at which time the "Gualala" must have reached position 4, according to Captain Curtis' judgment (Ap. 226-7, 232), as she was still forging ahead at 8 knots (406 feet per half minute), under her ported helm, for the "Gualala's" quartermaster had not steadied on his course at position 3 (Ap. 286), (Ap. 342-4). At this time, the "Argyll" must have been headed above the line 4-C, *as she still had not shown her green light* (Ap. 202). It is true, of course, that if the "Argyll"

had been below the line 4-C⁽²⁾, and if heading abaft the "Gualala's" bridge, she would not have shown her green light; but it is self-evident that she could not have reached such a position below line 4-C without having exposed her green light, for, to attain such position, she would have been required, first, to direct her course below the line 4-C⁽²⁾ under a starboard helm, and then swing back under a port helm, *necessarily showing her green light to the "Gualala" in the maneuver.* This, according to Gibbs, she had not yet done.

When the "Gualala" had proceeded for half a minute, being then in position 3, heading S. E. x. S. ½ S., Gibbs ordered her helm hard a'port (Ap. 290), and, 25 or 30 seconds later, *he saw the "Argyll's" green light for the first time* (Ap. 290). The "Gualala" was then heading S. S. W. (Ap. 265), and must have advanced to about position 4. Thereupon he reversed full speed astern (Ap. 290). *When the green light of the "Argyll" is claimed to have come into view, while the "Gualala" was thus headed S. S. W., Gibbs says that it was two points on the "Gualala's" port bow. Now it is manifest, beyond all possible question, that the "Argyll" could not have been seen one and a half points on the "Gualala's" port bow, or even dead ahead, showing her red light to the "Gualala", while the latter was headed S. E., and then have altered her course to port and maneuvered so as to attain a position bearing two points on the "Gualala's" port bow when the "Gualala" was at position 4, heading S. S. W., and then, when on said two point bearing, for the first time have exposed her green light to the "Gualala".*

One has but to look at the drawing and see the enormous distance the "Argyll" would have had to travel to reach such two point position, for, even if, as shown by the Curtis drawing (Exhibit F), the "Argyll" was only 5500 feet distant from the "Gualala" when the latter ported her helm at position 1, instead of a mile and a half away, as stated by Gibbs (Ap. 262, 281-2), she would have been required to travel several times the distance that the "Gualala" did in the period elapsing between the time when the "Gualala" first ported until the "Argyll's" green light came into view.

Moreover, it is certain that the "Argyll" could never have reached a position two points on the "Gualala's" port bow while the latter was headed S. S. W., without having shown her green light to the "Gualala" while the "Argyll" was proceeding from her original position, for she would have been required to turn sharply to port on a starboard helm, and thus bring her starboard side to the "Gualala". It is conclusive, therefore, that Gibbs' statement of the bearings of the "Argyll", from the time he first ported until the "Gualala" was reversed, is absolutely incorrect.

This was recognized and admitted by Captain Curtis, for whom Mr. Lillick vouched as "not only an expert, but a very good expert" (Ap. 231), for he said: "*It does not admit of any explanation, it is impossible*" (Ap. 236, 237).

The absurdity of Gibbs' statement that the "Argyll's" green light first came into view two points on the

"Gualala's" port bow, 25 or 30 seconds after he hard a'ported, is further shown by the drawing made by him at appellee's request, on the taking of his deposition (Libelant's Exhibit "A", copy appended). He shows as position 3, the bearing of the two vessels when the helm of the "Gualala" was put hard a'port. The next thing he saw of the "Argyll" she was in position 4 (Ap. 268-269). *Her green light would then have been exposed to the "Gualala", and yet he claims that when he first saw the green light of the "Argyll", the latter bore two points on the "Gualala's" port bow, when the latter was heading S. S. W.* (position "Gualala" A). If the "Gualala" was in position 3 when she hard a'ported and continued ahead at 8 knots for 25 or 30 seconds more, until the green light came into view at "Argyll's" position 4, then at that time, the "Gualala" must have swung farther to starboard toward a S. S. W. heading ("Gualala" A). It is plain to be seen that even if, when the green light was observed, the "Gualala" had been headed in the same direction as when her helm was hard a'ported at position 3, and the green light came into view when the "Argyll" was headed as shown by her position 4, *the latter could not, even then, have been two points on the "Gualala's" port bow.* Much less could she have had that bearing if, when in position 4, the "Gualala" had swung nearer to her S. S. W. course at the time the green light was first exposed.

The incorrectness, therefore, of Gibbs' statement as to the "Argyll's" bearings up to the time he claims

to have first seen her green light is proved to a demonstration.

Adding to the absurdity is the testimony of the Look-out Comstedt that he "*never noticed any green light at all*" on the "*Argyll*" (Ap. 359).

THE COLLISION COULD NOT HAVE OCCURRED AS DESCRIBED BY GIBBS.

It is impossible to ascertain definitely the position of the "*Gualala*" at the moment of the collision, as given by Gibbs. At the time he claims to have first seen the green light of the "*Argyll*", he says that the "*Gualala*" was heading S. S. W. (Ap. 265, 266, 267, 290, 297). He states that he then reversed full speed astern because of the green light (Ap. 264-5, 266, 267, 290, 294-5, 295-6), and says that the collision took place a minute later (Ap. 290, 291, 294-5). Subsequently, he testified that the "*Gualala*" was heading S. S. W. just a few seconds before the collision (Ap. 316), and claims that she was going ahead about a mile an hour at the moment of impact (Ap. 295-6, 317-8, 362-3). *If the "*Gualala*" was heading S. S. W. when Gibbs saw the green light, and the collision occurred a minute later, it is apparent that at the moment of impact the "*Gualala*" must have swung farther to the westward than S. S. W., and certainly farther in that direction than if the collision took place a few seconds after she was headed S. S. W., on seeing the green light. If the latter be the fact, and he reversed on seeing the green*

light (*which he says was what caused him to do so*), (Ap. 295), then the speed of the "Gualala" could not have been lowered to one knot per hour at the time of collision, for he testified that it required a minute for such reduction. We are thus left in uncertainty as to how far beyond the S. S. W. heading the "Gualala" had swung when the vessels came together, and as to what the "Gualala's" speed was at the time. *But it fixed, so far as appellees are concerned, that she had at least turned from the S. E. course to S. S. W., so that if, for the sake of argument, we assume her course at the moment of collision to have been S. S. W., we are taking the situation in its aspect most favorable to appellees, on the testimony of their own witnesses.*

The question which thus confronts the court, laying aside the inconsistency of Gibbs' statement that the green light of the "Argyll" first came into view two points on the "Gualala's" port bow when she was heading S. S. W., is whether a collision, 30° from ahead, could have occurred if the two vessels were, on sighting each other, in the positions fixed by Gibbs, and if at the moment of coming together, the "Gualala" was heading S. S. W., after having ported for half a minute until she was headed S. E. x S. $\frac{1}{2}$ S., then hard a'ported for half a minute, followed by reversing 25 or 30 seconds later, and then the collision a minute afterward.

The only independent witnesses, all of whom were competent to pass judgment on the question, including the expert produced by appellees, Captain Curtis, un-

equivocally stated that a collision could not have occurred as testified to by Gibbs.

On this point, Mr. James Dickie, the builder of the "Oregon" and many other war vessels and merchant ships, than whom there is a no more distinguished man in his profession in all of the United States, gave his opinion, as follows:

"Q. Mr. Dickie, I want to propound this question to you:

Assuming that the 'Gualala', a steam schooner, 120 feet long, loaded, while coming down the coast below Point Arena on a southeast course, making 8 knots per hour, observed, a point and a half on her port bow, the red light of the 'Argyle', a steamship 320 feet long, loaded, making 8 knots per hour, and that thereupon, the 'Gualala' ported her helm and payed off one and a half points in half a minute, and then hard a'ported for 25 or 30 seconds, and then stopped and reversed for a minute, but in the meantime, had swung 4½ points more so that she was then on a south southwest course and still going ahead a mile an hour under a hard a'port helm, would it, in your judgment, have been possible for the 'Argyle', in the minute following the stopping and reversing of the 'Gualala', to have so changed her course to port as to have first shown her green light to the 'Gualala' when the latter stopped and reversed, and then to have struck the 'Gualala' on the angle you have shown in your models?

A. No, there was not room.

Q. Could it make that maneuver in that time?

A. In neither the time nor the distance.

Q. Through what sort of a course would the 'Argyle' have to go in order to bring herself into collision under those circumstances?

A. *She would have to make an S course and she would be stopping during that time, which would throw the whole thing adrift.*

Q. Which way would it require her helm to be put?

A. *She would have to have a starboard helm first and a port helm afterwards, and she never could have done it in the distance.*

Q. Could she have done it in the time?

A. *She could not have done it in the time or the distance.*

Q. Could she have done it in the time that the 'Gualala' was reducing her speed from 8 knots to one knot by reversing full speed astern?

A. No.

Q. Could she have done it in the time required for the 'Gualala' to have changed her course from southeast to southwest?

A. No."

* * * * *

"Q. Would not the possibility of her making this S. in the meantime depend a good deal upon how her helm was turned during that 4 minutes?

A. *If the 'Argyle' was in the position as reported from the 'Gualala' it was utterly impossible in the time to get in the position and in the direction in which the collision occurred.*

Q. Are you speaking of the 'Argyle' being in the position as she was reported from the 'Gualala' on the port side of the 'Gualala'?

A. On the port side, yes, of the 'Gualala'.

Q. What would have been the situation if she had been on the starboard side of the 'Gualala'?

A. *She might have made it if she had been on the starboard side.*" (Italics ours.) (Ap. 152-3, 155-6.)

To the same effect was the testimony of Captain Pillsbury, a shipmaster and experienced surveyor, so well known to proctors for his high character and dis-

tinguished ability that they readily admitted his qualification. He, too, answered in the negative the same question propounded to Mr. Dickie, summarizing the testimony of Gibbs as to the courses and bearings of the vessels (Ap. 161, 162).

So with Captain Ferris, Marine Superintendent of the Union Oil Company, as well as Captain Dickson of the "Argyll", and Captain George Curtis, formerly chief officer of the "Argyll" (Ap. 173, 180-1, 98-9, 100-1, 145, 148-9).

The soundness of these conclusions is demonstrated by reference to the drawings made by Captain Lebbeus Curtis (Claimant's Exhibit "F", copy appended).

Taking the "Gualala" at position 1, when she ported, Captain Curtis placed her at position 3, as the approximate point she would reach in a half minute. At that point, Gibbs claims to have hard a'ported, and, 25 or 30 seconds later, reversed on seeing the green light. Captain Curtis fixed position 4 as the maximum distance the "Gualala" would travel under her hard a'port helm, in half a minute (Ap. 232-3). As, however, she ran only 25 or 30 seconds, it would necessarily be somewhat short of the distance given; but taking it at 4 is resolving the discrepancy in appellees' favor. When at position 4, the "Gualala" is said to have reversed on seeing the green light, and the collision came a minute afterwards. If in that minute she swung only to a S. S. W. heading, she would have been about in position 6, according to Captain Curtis (Ap. 238-9). But if she reversed at position 4 and

reduced her speed from 8 knots to 1 knot at the time of the collision, and was then on a S. S. W. course, she would, in Captain Curtis' judgment, have been near position 5 (Ap. 233-4). In his opinion, however, she would, in the time required to reduce from 8 knots to 1 knot, have been still more to the westward than S. S. W. (position 5) (Ap. 233-4). Again, however, we take it at 5, manifestly in appellees' favor. Thus we fix, as nearly as can be done, the positions of the "Gualala" at the different periods:

Position 1—"Gualala" ported her helm.

Position 3—"Gualala" hard a'ported.

Position 4—"Gualala" reversed on seeing green light.

Position 5—"Gualala" on S. S. W. course and speed reduced from 8 to 1 knot after reversing at position 4.

Position 6—"Gualala" on S. S. W. course in one minute after reversing at position 4.

The speed of the "Argyll" was 8 knots per hour, or 810 feet per minute. We have shown that if the green light of the "Argyll" first came into view when the "Gualala" was at position 4, the "Argyll" must have been, at all times prior thereto, to the eastward (above) of a line drawn from position 4 to the "Argyll's" position 2, where she was, approximately, when the "Gualala" ported at position 1, for, if the "Argyll" had passed to the westward (below) of the line, *she would, in so changing her course, have exposed her green light to the "Gualala"* (Ap. 239-40). If, then, the "Argyll" first showed her green light when the "Gualala"

la” was at position 4, the farthest westward the “Argyll” could have been was at some point on the line from 4 to the “Argyll’s” position 2 (C) (Ap. 239-40). According to Gibbs, this was about a minute before the collision. As the “Argyll”, at her speed, made 810 feet per minute, she then must have been at about the point P on the line 4-2 (C), if, in fact, the collision occurred one minute after reversing (Ap. 240-241), for P is 810 feet distant from the “Gualala” at position 6, where the latter would have been, heading S. S. W., one minute after reversing at position 4. On the other hand, if the collision took place when the “Gualala” reduced her speed from 8 knots to 1 knot, two and one-half minutes after reversing, according to Captain Curtis’ estimate, so that she was then in position 5, the “Argyll” must have been farther along on the line 4-2 than point O, 1620 feet distant from position 5 (Ap. 239-40), on showing her green light.

It is thus apparent:

First: That if the collision took place one minute after the “Gualala” reversed on seeing the green light, the “Argyll” must have traveled at least from point P to position 6, and must have so maneuvered that when the vessels came together, they were within 30° of meeting head and head.

Second: That if the collision occurred when the “Gualala’s” speed had been reduced from 8 knots to 1 knot, the “Argyll” must have traveled from a point on the line 4-2 (C) beyond O, and so maneuvered as to meet as the vessels admittedly did.

The impossibility of the collision occurring under such conditions was frankly admitted by Captain Curtis, appellee's expert, but made claimant's witness (Ap. 240-41-42).

If the collision was possible, under the circumstances as Gibbs described them, certainly proctors would have produced some testimony to that effect. Captain Rinder was in court throughout the trial and was placed upon the stand as an expert on navigation, but proctors studiously avoided any reference to the question so determinative of the "Gualala's" fault. *Nor did they even produce as a witness upon the trial, the master of the "Gualala", or take his deposition, although he was the one more than all others who must have known of the "Gualala's" capabilities as to speed, reversing and stopping, answering her helm, and changing her course.*

The reason for the impossibility of the collision under the conditions is manifest. The "Argyll" was a large vessel, 320 feet long, 40 feet 7 inches beam, and 27 feet deep, with a tonnage of 2953 gross (Ap. 97-98). As described by Mr. James Dickie, Captain Pillsbury, Captain Dickson and Captain Ferris, *she would have been required to swing on a hard a'starboard helm and then, when she had gotten sufficiently ahead of the "Gualala", to reverse full speed astern, so as to stop her headway and swing to port, and then go ahead on a hard a'port helm and swing around so as to meet the "Gualala" at an angle of 30° from ahead, practically describing the figure S.* To have done this, plainly would have required her to alter her course so sharply

to port as to bring her onto a course practically parallel to that of the "Gualala", and heading the same way, and then, when she was far enough ahead of the "Gualala" to give her time to do so, she would have had to swing about sharply on a hard a'port helm. With both vessels making the same speed, 8 knots, and the "Argyll" more sluggish in responding to her helm (Ap. 51-52, 97-8, 140-1, 176-7, 219-20), it is manifest that up to the time the "Gualala" reversed, the "Argyll" could not have gotten as far, let alone farther, to the westward than the "Gualala", even if they were directly ahead of each other, and started to turn simultaneously. *With the "Argyll" farther to the eastward, where she would have been if she were one to one and three-quarters points on the "Gualala's" port bow, it is certain that the "Argyll" could not have gotten as far to the westward of the "Gualala's" S. E. course as did the latter up to the time she reversed, for both had the same speed, 8 knots.* And if she did not, certainly Gibbs did not see the "Argyll's" green light for the first time two points on the "Gualala's" port bow when the latter was heading S. S. W., and the "Argyll" could not, in a minute, or while the "Gualala" was reducing her speed from 8 knots to 1 knot, have then gotten ahead of the "Gualala", and checked her headway and swung about on a port helm so as to bring the vessels together at the angle they met.

Moreover, to find that the collision occurred as thus described by Gibbs would be to find that the "Argyll" deliberately starboarded her helm and turned to port

in the face of passing signals exchanged, which required the very opposite maneuver.

Is that reasonable or probable? In fact, is there, save for Gibbs' and the lookout's bald statements, anything in the entire record which can lead to the conclusion that their version was in accord with probabilities, let alone the facts or possibilities? Most certainly not.

What, then, becomes of Gibbs' statement as to the courses and movements of the "Argyll"? He, and his lookout who never saw the "Argyll's" green light, are utterly discredited. *In face of the fact that the collision could not, and, therefore, did not, result from the "Argyll's" swinging to port under a starboard helm, we respectfully submit that it cannot be found that the two vessels were approaching port to port, showing their red lights to each other.* On the other hand, if, as we shall show, the collision could have occurred if the vessels were approaching green to green, and each ported her helm, upon the "Gualala" indicating such change of course by one blast of her whistle, and the "Argyll" responding with a like signal, as testified to by all the "Argyll's" witnesses, then this court should find that the collision occurred in that manner.

This result means but one thing, and that is that the "Gualala" deliberately violated a positive rule of navigation, and, thereby, committed the primary fault of the collision, by porting her helm, and attempting to cross the "Argyll's" course, when not only the

"Rules of the Road", but common sense, required her to pass starboard to starboard, either by holding her course, or by starboarding her helm, if change of course was required to pass in safety.

THE VESSELS WERE APPROACHING STARBOARD TO STARBOARD, AND THE COLLISION WAS CAUSED BY THE "GUALALA" PORTING.

The testimony of all of the "Argyll's" witnesses who saw the lights and position of the "Gualala", is unanimous that the "Gualala's" range light was first observed about one and a half points on the "Argyll's" starboard bow, and that immediately thereafter the green light came into view. The attention of McAlpine, the third officer, who was in charge of the bridge, was called to the light by the lookout, who reported a green light (Ap. 45-46). He saw that the approaching steamer was well clear on the starboard bow, in a safe position, and took two or three turns up and down the bridge (Ap. 47). Shortly afterward, the "Gualala" blew one whistle, ported her helm, and showed her red light to the "Argyll", indicating to McAlpine that the "Gualala" was attempting to cross his bow (Ap. 47-48). McAlpine judged her to be about three ship-lengths off at the time, and there was, in his judgment, no time to do anything to avoid the collision except port the "Argyll's" helm and try to clear the "Gualala" (Ap. 48). This he did, indicating to the "Gualala" his porting of helm, by one blast, and immediately following it up with a full speed astern

on the "Argyll's" engines, and three blasts on his whistle, as the rules required (Ap. 48). The two vessels came together, however, the "Argyll" striking the "Gualala" on the latter's port bow.

This was corroborated by the lookout, Hansen, who testified that the first he saw of the "Gualala" was her mast head light (Ap. 120), and that next he saw the green light bearing a point and a half or two points on his starboard bow (Ap. 121). He reported the mast head light to the bridge, and immediately thereafter the green light (Ap. 121). He says that then he heard one whistle from the "Gualala", and continued to see the green light for a second afterwards, and then "just a few moments" after the one whistle, saw the red, green and mast head lights together for an instant (Ap. 121, 124-5). The vessels came together at an angle which admittedly exposed only the "Gualala's" red light to the "Argyll".

Hansen estimated the distance of the "Gualala" away at the time he first saw her lights, at about three or four shiplengths, and at about three shiplengths when she blew one whistle (Ap. 126-7). He says that the "Argyll" answered the one whistle with a like blast (Ap. 121), and just a few seconds afterwards he heard three whistles from the "Argyll" (Ap. 122-3).

The quartermaster, Torbjorsen, who was stationed in the pilot-house, steering the "Argyll", looked out when he heard the lookout first report the lights (Ap. 139-40), and saw the mast head light about a point and a half on the "Argyll's" starboard bow (Ap. 136-37, 139-40). He received an order from McAlpine to hard

a'port his helm immediately after the "Argyll's" one whistle, which order was obeyed (Ap. 137-8). He also heard three whistles blown by the "Argyll" shortly after the first whistle, guessing the intervening time to be about one minute (Ap. 137-8).

Captain Dickson heard the first whistle of the "Argyll" as he was coming out of the mess room where he had stopped to get a cup of coffee, on his return from the toilet (Ap. 95-7), and immediately went to the bridge as fast as he could, and, on arriving there, saw the "Gualala" between a point and a point and a half on the "Argyll's" starboard bow, showing her mast head light and a red light, and crossing his bow (Ap. 95-7). While going along the deck to the bridge, he heard other whistles from the "Argyll", which he thought were three, but would not state positively (Ap. 96-7). He gave no orders after reaching the bridge because there was no time (Ap. 97-8, 103).

The foregoing testimony establishes beyond all doubt that the "Gualala" approached on the "Argyll's" starboard bow, showing her green light, at a bearing of one and a half to two points, and that shortly after the green light came into view, the "Gualala" blew one blast on her whistle, ported her helm and attempted to cross the bow of the "Argyll".

It further shows that immediately the "Gualala's" one whistle was heard, indicating her intention to port, the "Argyll" answered with a like whistle, hard a'ported, and reversed full speed astern, advising the

“Gualala” of the fact by three blasts, as the only possible way of avoiding the danger of collision precipitated by the wrongful change of course by the “Gualala”.

It was the opinion of Captain Pillsbury that the collision could have thus occurred so as to have brought the vessels together at the angle of impact testified to by Mr. Dickie (Ap. 162), and that “*that is the only way it could be*” produced (Ap. 164-5). This was likewise the opinion of Captain Curtis (Ap. 248, 249-50, 250-1).

In view, therefore, of the fact that the vessels could not have come together as they did if they were approaching so that the “Gualala” had the “Argyll’s” red light on her own port bow, but that the collision could have occurred at the angle at which they met, if they were approaching green to green and the “Gualala” ported in an attempt to cross the course of the “Argyll”, and the latter, in turn, hard a’ported in an effort to swing clear, as testified by the “Argyll’s” witnesses, we respectfully submit that the court should find that the collision so occurred. This is in accord with what must have been the opinion of the lower court, for it found that the “Gualala” was on a crossing course upon the “Argyll’s” starboard side. It could never have been so if the vessels approached and altered their courses as testified by the “Gualala’s” witnesses, but naturally would have resulted from the “Gualala” porting her helm, and, thereby exposing both her lights, and then shutting out the green, if they approached starboard to starboard.

THE "GUALALA" WAS IN FAULT FOR PORTING HER HELM AND ATTEMPTING TO CROSS THE COURSE OF THE "ARGYLL", AND MUST BE HELD RESPONSIBLE FOR THE ENSUING COLLISION.

The collision having been caused by the "Gualala" porting her helm and attempting to cross the course of the "Argyll" at a time when the vessels were approaching starboard to starboard, the "Gualala" must be condemned in fault.

This was so held by Circuit Judge Sawyer and District Judge Hoffman in the United States Circuit Court, District of California, in the case of

The Ping-On v. Blethen, 11 Fed. 607,

on an appeal from a decree rendered by the United States Consular Court at Shanghai, China. In that case, the brig "Condor", in tow of a tug, and the steamer "Ping-On" were approaching with their green lights to each other, the lights of the steamer bearing from two to two and a half points on the "Condor's" starboard bow when first seen. The "Ping-On" was held in fault for porting her helm. On the question of liability, Judge Hoffman, writing the opinion, said:

"It may not be improper, however, to make some observations with regard to the liability of the latter.

"If we are right in considering the tug and tow free from fault, the collision must be attributed to the fault of the Ping-On, or to inevitable accident.

"(1) The evidence, we think, shows that if the Ping-On had held her course the vessels would have passed clear of each other.

"(2) If the *Condor's* green light had been sighted by the steamer on her starboard bow, and the red light not sighted, she was clearly wrong in porting her helm, the vessels not being 'end on, or nearly end on', to each other within the meaning of the rule." (Italics ours.)

In

The Roanoke, 45 Fed. 905,

the brigantine "Hyperion", having, under the rules, the right of way over the steamship "Roanoke", was held solely in fault for changing her course across that of the steamer.

The case of

The Eagle Wing, 135 Fed. 826, (affirmed) 162

Fed. 827,

is similar to that of the case at bar in point of principle, though the collision was between two sailing vessels. They were approaching each other with their lights red to red, when the "Eagle Wing" suddenly changed her course so as to shut in her red light and expose her green light, and struck the "Hargraves" on her port side abaft amidships. The court held the "Eagle Wing" solely in fault.

A decision peculiarly in point with the one now before the court, and determinative of it, is that of the Circuit Court of Appeals for the Third Circuit, in

The Atlantic City, 143 Fed. 451,

reversing the District Court, and holding the steamer "Sylvan Glen" alone in fault. The "Sylvan Glen"

was bound up the Delaware River, and the "Atlantic City" bound down, the two vessels showing their green lights to each other. While so approaching, each gave to the other a passing signal of two blasts, which the pilot of the other did not hear. When they had reached a position of probably not more than 300 feet apart, the "Sylvan Glen" suddenly ported her helm, and sheered across the "Atlantic City's" bow, resulting in the latter striking the former on the port bow. The court held the "Sylvan Glen" responsible, notwithstanding she had apparently mistaken a single blast from a tug as a signal from the "Atlantic City" calling for a ported helm.

The Supreme Court in

The Free State, 91 U. S. 200; 23 L. ed. 299, affirmed a decree of the Circuit Court dismissing a libel brought by the owner of a sailing scow against the propeller "Free State", on the ground that the loss of the scow was due solely to her fault in suddenly changing her course across the bow of the propeller while the two vessels were approaching starboard to starboard.

In

The Manitoba, 122 U. S. 154; 30 L. ed. 1095, the Supreme Court considered the question of the liability of the "Manitoba", involved in a collision between that vessel and the steamer "Comet", resulting from the latter porting her helm and suddenly sheering across the "Manitoba's" course at a time

when the vessels were approaching on nearly opposite courses with their green lights showing to each other. The District Court (F. C. 9029) held both vessels in fault. An appeal was taken by the owners of the "Manitoba" to the Circuit Court, but the owners of the "Comet" did not appeal. The Circuit Court affirmed the decision of the District Court, and an appeal was then taken by the "Manitoba" to the Supreme Court, which affirmed the decisions of the lower courts. On the question of the "Manitoba's" fault, Mr. Justice Brown, delivering the opinion of the court, said:

"On the facts, the Circuit Court found as a conclusion of law, and we think correctly, that the 'Manitoba' was in fault in not indicating her course, by her whistle, and in not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby."

It will be noted that *the District Court readily found the "Comet" at fault for making a change of course identical with that of the "Gualala"*, in the case at bar. *The "Manitoba" was also held because, prior to the sudden porting of the "Comet", her bearing in on the "Manitoba" was observed by the latter, indicating a porting, and yet the "Manitoba" starboarded and continued ahead at full speed, instead of slowing and reversing, until it was too late to accomplish anything.* Here, the "Argyll", by porting, and immediately reversing, and indicating it by her whistles, took the very measures, for the want of which the "Manitoba" was condemned. This case, therefore, is clearly an authority for holding the "Gualala" responsible.

A case of marked similarity to the one at bar in respect to the differing versions of the collision, and the primary cause of the same, was that of

Stoomvart Maatschappy Nederland v. Peninsular and Oriental Steam Navigation Company, L. R. 5. A. C. 876.

It was admitted that the "Voorwaarts" ported her helm and that the "Khedive" starboarded, but, as in the case at bar, those on board the "Voorwaarts" claimed that the steamships were approaching with their red lights opposed, whereas the witnesses for the "Khedive" asserted that they were starboard to starboard. The case was tried in the Court of Admiralty, which held both steamships liable, but, on appeal, the Court of Appeal varied that decision and found the "Voorwaarts" alone at fault. An appeal was then taken to the House of Lords, which reversed the Court of Appeal and held both vessels in fault.

The Court of Appeal came to the conclusion that the steamships were approaching each other green light to green light, with so large a bearing as to make it certain that if both kept their course they would have passed in safety. It also found that while so approaching, the "Voorwaarts" suddenly put her helm hard a'port and sheered toward the "Khedive". The "Khedive" thereupon hard a'starboarded, and an order to "stand by" was given to the engine room. Half a minute later, full speed astern was ordered, but the collision was not avoided. The Court of Appeal held the "Voorwaarts" for porting, but exonerated the

“Khedive” on the ground that while her master did not do what was absolutely the right thing by ringing to “stand by”, instead of immediately reversing, he was not to be found guilty of want of ordinary care, and skill, and nerve, under the difficult circumstances in which he was placed.

The House of Lords, while apparently not disagreeing with the advice of the nautical assessors to the Court of Appeal as to the conduct of the “Khedive’s” master, and with regret that they were compelled to reach a different conclusion from the Court of Appeal, reversed that decision, and held the “Khedive” liable under the provisions of the Merchant Shipping Act, 1873, 36 and 37 Vict. C. 85, S. 17, providing in effect, that any ship infringing any regulation for preventing collisions shall be deemed at fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary.

There was no question in all the minds of all the courts about the fault of the “Voorwaarts”, in porting, but the “Khedive” undoubtedly would not have been held liable, except for the drastic statutory provisions, and most certainly would have been exonerated if she had immediately reversed upon seeing the red light of the “Voorwaarts”. Inasmuch as the “Argyll” did reverse at once, the case is a positive authority for holding the “Gualala” alone to blame for the present collision.

It must follow that the "Gualala", by porting her helm and attempting to cross the bow of the "Argyll", at a time when their courses would have carried the vessels clear, committed the fault which produced the collision, and must be held responsible therefor. The fault of the "Gualala" being thus obvious and inexcusable, and adequate in itself to account for the collision, all presumptions will be resolved in favor of the "Argyll", and she will not be condemned except by clear and convincing proof of a contributory fault.

Belden v. Chase, 150 U. S. 674; 37 L. ed. 1218;
The Oregon, 158 U. S. 186; 39 L. ed. 943;
The Victory, 168 U. S. 412; 42 L. ed. 519;
The Chicago, 125 Fed. 712;
The Wm. Chisholm, 153 Fed. 704;
The Georgetown, 135 Fed. 854.

THE ALLEGED FAULTS OF THE "ARGYLL".

I. *The Lookout.*

The District Court expressed the opinion that the "Argyll" must be held responsible for the collision for "inefficiency of the lookout in not reporting when the 'Gualala's' red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone".

Neither the evidence nor the law, we respectfully submit, sustains the ruling of the District Court. Hansen, the lookout, testified that he saw the mast headlight

and immediately afterward the green light, at what he estimated to be three or four ship lengths off, a point and a half or two points on the starboard bow, both of which lights were immediately reported to the bridge (Ap. 119-22). The fact that the lights were not seen a greater distance off did not indicate want of diligence, for it may have been due to atmospheric conditions, of which there was at least some evidence from both vessels (Ap. 110-20, 259-6). Surely the foregoing shows a proper performance of the lookout's duty.

What then happened? The "Gualala" blew one whistle which was immediately answered, a fact established by a concurrence of testimony from both vessels (Ap. 121-2, 262). What could that have meant to him, or to any lookout, other than that the presence and the intended change of course by the "Gualala" were known to the bridge officer of his own vessel? Did his failure, then, to report a change of course, and a whistle showing such alteration, which was, on the admission of the "Gualala's" witnesses, immediately answered, contribute to the collision? Most certainly not.

And then what? What maneuver did the one whistle of the "Gualala" indicate she intended making? Hansen knew, and any other seafaring man would have known, that it meant a porting of helm, and that such a change of course on the "Gualala's" part would expose both her lights for an instant, and then shut out her green light and leave alone the red light. He knew from the answering of the whistle by the "Argyll" that the bridge officer of the latter was alive to the proposed

change of course, and its effect upon the "Gualala's" lights (Ap. 131-32). Can he then be said to have been negligent and inefficient in not reporting both lights, the disappearance of the green, and then the red light alone, when he knew that his bridge officer was advised as to the situation? We submit not.

This was pointed out in

The Livingstone, 113 Fed. 879, 882,

wherein the "Traverse" was held not in fault though her lookout left his post, the court saying:

"Any intelligent man must have known from the whistle in what direction the 'Traverse' was going to swing, and no light was needed to tell him that if he starboarded, he would bring his own boat into peril."

And if Hansen had reported both lights, and then the red light alone, it would not have avoided the collision, for immediately the proposed change was made known by the "Gualala's" one blast, the officer of the "Argyll" did all that could be done, by porting his helm, and reversing full speed astern, in an endeavor to throw her away from the altered course of the "Gualala". No inefficiency or negligence of the lookout, therefore, conduced to the collision.

II. *The Deck Officer.*

The District Court was also of the opinion that the "Argyll" must be held responsible for the collision

"for negligence on the part of McAlpine, the deck officer, in not observing the 'Gualala's' course

because of his failure to note when her red light and her green light were visible together, and when her green light disappeared from view; because of his failure to observe her red light until warned by her whistle; and because of the fact that when the 'Gualala's' lights were first sighted he contented himself with directing the quartermaster not to let her come any closer, apparently paying no further attention to her until warned by her whistle when it was too late to avoid a collision."

We may, perhaps, be permitted to anticipate that proctors for appellees will, as they did in their briefs in the court below, make strenuous attack upon the credibility of McAlpine, the third officer of the "Argyll", in charge of her navigation at the time of the collision. This was laid upon two points, the authorship of the entry in the log "Altered course $\frac{1}{2}$ point to port", and the statement made by him in his report to the inspectors that he gave the danger signal. We say frankly to the court; as we did to the trial court, that we believe McAlpine mistaken when he said, in effect, that he did not make the log entry, for we are of the opinion that it is in his handwriting. Likewise, we believe that he was in error in his report to the inspectors about the danger whistle. We ask no sufferance at the hands of the court because of such errors, however, for we fully appreciate that they entitle both counsel and the court to accept the officer's testimony upon other matters only after the closest scrutiny as to its reliability. But we do suggest that if in other particulars pertinent to an ascertainment of the cause of the collision, the mate has given evidence corroborated by those not subject to the same suspicion, the testi-

mony of the mate should be received with such weight as the court deems proper.

The log entry indicates an alteration of course one-half point to port. The quartermaster said that he held to his course until the hard a'port order came. We cannot, therefore, urge the acceptance of the log entry, nor can we ask the court to disregard it, if it feels that we are bound by it. We do, however, assert, if the court believes it to establish that the course was so changed, which, in view of the quartermaster's statement, we do not think was done, that such alteration of course was not a fault, but a very proper maneuver with the "Gualala" approaching to starboard. That alteration, if it took place, certainly did not contribute to the collision, for it would have veered the "Argyll" away from the "Gualala". But even if the entry be accepted as binding, it constitutes no ground for asserting that the "Argyll's" course continued to port, against the positive statement of the quartermaster to the contrary, and against the one blast whistle, which required the opposite change of helm, the error of which, if the "Argyll's" course was continued to port, would have been known both to the quartermaster and the look-out. Moreover, if such change to port was made, or a prior one continued upon the whistle, it is unanswerable that it would have immediately exposed the green light to the "Gualala", and yet Gibbs says that he never saw it until 25 or 30 seconds after he had hard a'ported to S. S. W. from S. E., and then it showed two points on his port bow. These facts, taken together, justify the belief that the "Gualala's" green light was on the

"Argyll's" starboard bow, and that upon hearing the former's whistle, the helm of the "Argyll" was immediately hard a'ported.

This can not be claimed to have been an error. It is apparent that it offered the only chance of escape from the extremity in which the "Argyll" was placed by the "Gualala's" sudden attempt to cross her bow (Ap. 49-51). What else was to be done? Could it be reasonably suggested that her helm should have been starboarded, or that she should have been held steady in her course? The situation created by the wrongful maneuver of the "Gualala" certainly did not call for either, but did require the very act which was done by the "Argyll". This was forcibly pointed out by Judge Brown in

The Manitoba, supra, F. C. 9029,

a case of collision that so nearly parallels the present as to strike immediate attention. There, the "Manitoba" hard a'starboarded when the "Comet" suddenly turned across her bow from a starboard hand course. Of the starboarding of the "Manitoba's" helm, the court said:

"While I make no criticism upon the action of the 'Manitoba' here in putting her helm hard a'starboard, *although I think this was an error*, I am of the opinion that she should have stopped and reversed. *If she had ported or slowed and backed, and perhaps if she had done nothing, the collision would not have taken place.*"

McAlpine was not, then, in error, when, upon being advised that the "Gualala" intended crossing his bow,

he ported his helm and advised the "Gualala" of that fact. Had he alone ported, however, he would surely have fallen within the condemnation of the court, but instead, he immediately reversed full speed astern, as suggested by Judge Brown to be the proper maneuver under similar circumstances.

It is to be noted that the lower court made no criticism of the hard a'porting of the "Argyll's" helm and the reversal of her engines, as a wrong maneuver, but did comment adversely upon an alleged failure on McAlpine's part to note quicker the change of the "Gualala's" lights. The criticism is without merit, unless it was imperative that McAlpine should have kept his eye at all times fixed upon the "Gualala" after he first saw her.

It clearly appears from McAlpine's statement that he saw the "Gualala's" green light bearing one and a half points on his starboard bow, and that he knew there was no risk of collision therefrom. He, thereupon, did what we submit was reasonable and prudent seamanship, *paced the bridge*. With the "Gualala" approaching on that bearing, showing her green light, there was manifestly no risk of collision if the "Gualala" did her duty and held her course, for the two vessels could not have collided. This was clearly pointed out in the late case of

Duluth S. S. Co. v. Pittsburg S. S. Co., 180 Fed. 656, 658,

wherein the court said:

"When the colliding vessels became factors in their proper navigation with relation to each other,

they were three-quarters of a mile apart. Each of them had the other on her starboard quarter about half a point. Had the relation continued, the vessels would have passed starboard to starboard in safety."

The Manitoba, supra.

With two vessels approaching with like lights opposed, on a bearing that meant certain passing in safety if each held her course, we know of no decision which holds a vessel in fault because her bridge officer continued to pace her bridge (40 feet wide) keeping his watch over both bows, and observing the approaching steamer when he walked the bridge toward the side she was on. Even Captain Curtis admitted such to be the custom on board ship, for he testified:

"Q. Would you keep your eye on the green light all of the time?

A. Not every second, no.

Q. Would you not and is it not customary for the officers to pace the bridge when they are on watch?

A. Yes.

Q. And if an officer on the bridge sees a light on one side or the other a distance off which he judges is a safe passing distance, is it not customary for the officer to pace the bridge keeping a lookout over both bows?

A. Yes" (Ap. 219).

Captain Rinder, on the other hand, would have the court believe that it was proper navigation to have the bridge officer stand in one position on the side of the bridge nearest to the approaching vessel, with his eye constantly upon her, and, on his own admission, thus leave the other side without a bridge watch. We do

not anticipate that any weight will be given to such evidence, for a proper bridge watch is not neglecting either bow, but, as Captain Curtis admitted, lookout over both bows is to be maintained by customarily pacifying the bridge. Had the "Gualala" been approaching "head on", undoubtedly close watch would have been required, but, when the vessels were on passing courses, which, if maintained, as each had the right to rely upon, would have carried them by in safety, it certainly cannot be seriously urged that it was negligence for McAlpine not to stand in one position with his eye constantly upon the "Gualala", in anticipation that she would commit an error which the courts have characterized as highly improbable.

It is admitted by the "Gualala" that she did not change her course until her one blast passing whistle was blown, so that up to that time the change in her lights had not taken place. *Immediately such whistle was blown, McAlpine ordered his helm hard a'port, and at the same time blew one blast on his whistle, advising the "Gualala" of the porting, then instantly reversed full speed astern and gave three blasts on the "Argyll's" whistle* (Ap. 47-48). The fact that such porting and reversing took place immediately upon receipt of the "Gualala's" passing signals is supported not only by McAlpine's statement to that effect, but by the master, the engine-room log book and the nature of the damages.

The master was just coming out of the mess-room with a cup of coffee in his hand, when he heard the first whistle (Ap. 96-97), and immediately went to the bridge

as fast as he could get there (Ap. 95). A series of whistles, which he took to be three, were blown just as he was getting onto the poop-deck (Ap. 96-97), and upon reaching the bridge, he found the "Argyll's" helm hard a'port and her engine working full speed astern, with the "Gualala" about one and a half points on the starboard bow, showing her red light (Ap. 96-98). *This establishes beyond peradventure that the three whistles were blown immediately after the one blast, and the engine reversed with the helm hard a'port.*

Furthermore, the "Argyll" suffered no damage, which shows, as Mr. Dickie testified, that her speed must have been greatly reduced (Ap. 154-155). This, manifestly, could not have been accomplished in the time elapsing between the "Gualala's" alteration of course and the collision, unless the engine was immediately reversed upon the "Gualala's" porting.

Surely, therefore, the evidence clearly establishes that no delay took place in the immediate and proper maneuver of the "Argyll" under most surprising and trying circumstances. It will, indeed, be harsh justice to condemn McAlpine for not having his eye fixed upon a vessel, so situated as to pass in safety if the rules of the road were but obeyed, at the very moment a violation of such rules took place, in view of the fact that immediately such change of course was made, he had the coolness and intelligence to do the one thing which could possibly prevent the collision, by making the very maneuver which has met with the approval of both English and American admiralty courts, porting his

helm and reversing, and indicating such maneuvers by their proper signals.

We respectfully submit, therefore, that the District Court erred in charging the "Argyll" with fault.

ASSUMING THAT THE VERSION OF THE COLLISION TESTIFIED TO BY THE "GUALALA'S" WITNESSES IS TRUE, IT ESTABLISHES INEFFICIENCY AND NEGLIGENCE ON THE PART OF THE BRIDGE OFFICER AND LOOKOUT.

The Bridge Officer.

If it be assumed, for sake of argument, that the statement of Gibbs, first officer of the "Gualala", was correct in that the "Gualala", while proceeding on a S. E. course, saw the range lights of the "Argyll" bearing about a point and a half on the "Gualala's" port bow (Ap. 261-2), and, that thereupon one whistle was blown, and the helm ported, altering the "Gualala's" course a point and a half to starboard (Ap. 262, 286, 297); that a half minute later the helm was put hard a'port (Ap. 290), and 25 or 30 seconds afterwards, when the "Gualala" was headed S. S. W., the green light of the "Argyll" was observed bearing two points on the "Gualala's" port bow (Ap. 290), whereupon the "Gualala" was reversed full speed astern, *then such statement proves to a demonstration that Gibbs was not maintaining the efficient watch required of a bridge officer.*

If the court will but refer to Gibbs' drawing (Libellant's Exhibit A, copy appended), or to that made by

Captain Curtis in open court at appellant's request (Claimant's Exhibit F, copy appended), or to the latter's drawing made by him at appellees' request before he was produced as an expert witness by them (Libelant Beadle's Exhibit 4), it will be at once apparent that if the "Gualala" had the "Argyll" a point and a half on her own port bow, or even dead ahead, when the "Gualala" first altered her course to starboard, the "Argyll" could not have changed her course to port, as contended by Gibbs, without immediately exposing her green light to the "Gualala".

Take "Libelant's Exhibit A"! Gibbs shows the "Argyll's" green light broadly exposed when the latter was in her fourth position, and she certainly was not then two points on the "Gualala's" port bow when heading S. S. W. From the moment she would swing to port from her third position, she would begin to bring the green light into view, and so continue it until the collision.

Similarly with Claimant's Exhibit "F".

The instant the "Argyll" should swing to port so that her bow would be below the line 3 C ⁽²⁾ or 4 C ⁽²⁾, she would expose her green light to the "Gualala". Moreover, such alteration of course would be necessary if she were to pass from a position on the port bow of the "Gualala", or even dead ahead, to two points on the latter's port bow when she was heading S. S. W. at positions 4, 6 or 5. It demonstrates either the absurdity of Gibbs' statement as to the positions and movements

of the two vessels, or the utter carelessness of the watch he maintained.

And so with Libelant Beadle's Exhibit "4".

The "Argyll" at position A is showing her green light to the "Gualala", and would continue to do so during all the time she followed course B, until the impact, and yet not until the "Argyll" is shown as swinging back to the eastward under a port helm, from her dip to the westward on the course B, is she any where near two points on the "Gualala's" port bow.

It establishes beyond dispute that if Gibbs first saw the "Argyll's" green light two points on the "Gualala's" port bow, when the latter was headed S. S. W., he could not have been watching her with any degree of care after he first ported and gave the one blast passing signal. Thus, on her own bridge officer's testimony, taken at its face value, the "Gualala" must be held at fault.

The Lookout.

It is even worse with the lookout. Notwithstanding that the "Argyll's" green light would have been continuously in view to the "Gualala" from the time the "Argyll" altered her course to port, until the moment of collision, if Gibbs' statement were correct, *the lookout says positively that he never saw it*, although he claims to have been standing on the "Gualala's" forecastle head until the collision (Ap. 358-9).

His testimony so illuminates either the watch that was being maintained on the "Gualala", or the unre-

liability of the "Gualala's" version of the collision, that we quote it:

"Mr. CAMPBELL. Q. Where were you standing at the time of the collision?

A. Upon the forecastle head.

Q. I thought you said you ran aft?

A. Well, when she struck I ran aft.

Q. *What lights did you see on the 'Argyll'?*

A. *Her red light and mast light.*

Q. *That is all.*

A. *Yes.*

Mr. WALL. Q. *Did you see any green light at any time?*

A. *No, never noticed any green light at all.*

* * * * *

Q. You say you could see the 'Gualala' swinging to starboard?

A. I could see her swinging on those lights when we started to swing.

Q. *How far did you swing around to starboard as far as you could tell?*

A. *Well, I don't know, quite a bit all right, four or five points,* something like that.*

Q. And the 'Argyll' was coming toward you all the time?

A. Yes, she was coming after us. *I could not see her swing at all.*

Q. You were watching her during that time?

A. Yes.

Q. *You could not see her green light at any time?*

A. *I did not notice her green light at any time.*

Q. *Did you ever notice her green light at all?*

A. *No, I never noticed it.*

Q. Where did she strike the 'Gualala', the 'Argyll'?

A. Just on the break of the forecastle head.

* Five points from the S. E. course of "Gualala" would be S. x W., within one point of S. S. W. stated by Gibbs.

Q. *Do you know about what sort of an angle she struck?*

A. *Well about right ahead like, pretty near right ahead*'' (Ap. 358-360).

It is interesting and instructive to contrast Gibbs' testimony with the foregoing.

“Q. What was the first that you saw of the ‘Argyll’?

A. I saw her range light when I first saw her.

Q. About how far away was it when you saw it then?

A. It was about a mile and three-quarters, or a mile and a half” (Ap. 261).

* * * * *

“Q. What bearing were those lights from you?

A. Well, those range lights that I saw were nearly in range.

Q. And upon which side of your bow were they?

A. They were on my port side.

Q. About what distance in points on the bow itself, if you know?

A. About a point and a half on the port bow.

Q. What lights, if any, did you see next on the ‘Argyll’?

A. About 3 minutes before the collision I saw her port side light.

Q. Were you watching her in the meantime?

A. Yes, I had been watching these range lights to see if she had changed her course.

Q. Did she change her course any?

A. She did not change her course up till that time.

Q. Then what occurred?

A. Then I blowed her one blast of the whistle, which she answered immediately.

Q. What did you do as to giving orders to your man at the wheel?

A. I told my man at the wheel to put his helm to port; the vessel paid off about 1½ points.

Q. What difference, if any, occurred, as to the lights of the 'Argyll'?

A. Well, I seen the 'Argyll's' range light changing, but I did not see any other side lights except the red light, and I told the man at the wheel to put him helm hard a'port.

Q. In which direction did these range lights change, if you know, as to whether or not the 'Argyll' was coming upon one course or another?

A. Well, it did not look to me as though she had changed her course, but it appeared that she was not porting her helm at that time; it looked to me as if she had not ported her helm; it looked to me as though she was coming to starboard.

Q. How long after that was it before you saw her side lights?

A. *Then the next thing I saw was her green side light.*

Q. *Was that after you had seen her red light?*

A. *Yes, that was after, yes.*

Q. *How long after?*

A. *Well, it was about a minute and a half.*

Q. Going back to where you were watching her range lights, Mr. Gibbs, I do not understand the testimony showing that you saw a red light before having seen her green light. Which of her side lights did you see first, after having seen her range lights?

A. I seen her red side light first.

Q. *How long was it after you saw her red side light that you saw her green light?*

A. *It was about a minute and a half afterwards.*

Q. On what course were you steering then?

A. We were steering about south southeast then —no, no. *The helm was hard a'port then, and I had not seen this green side light at that time.*

Q. Mr. Gibbs, go back to the time when you saw her range lights first, and in your own way tell consecutively what courses you were steering when you first saw his range lights, and then when one light after the other, if they did, came up, and what

you did about changing your course. Commence with the course that you were steering when you saw the range lights.

A. Well, the first thing I saw was her range lights.

Q. What course were you steering then?

A. We were steering south southeast, or south-east" (Ap. 262-4).

* * * * *

"Q. You saw her range lights; then what?

A. I saw her range lights and I saw her port side light; I blowed one blast of the whistle, and told the man to put his helm to port; we was heading south southeast then. I seen these range lights changing and I told him to put his helm hard a'port, and then I saw the green side lights; then I stopped and backed full speed astern.

Q. When you stopped and backed full speed astern upon what course were you steering, if you know?

A. Well, we was heading south southwest at that time.

Q. South southwest?

A. South southwest, yes.

Q. What whistles, if any, did you hear upon the 'Argyll'?—did he answer your one whistle?

A. He answered the one whistle, but he didn't blow any more whistles; there was no more whistles blown.

Q. Did you hear any signals from the 'Argyll' with reference to his stopping and backing?

A. No, I don't think he ever stopped and backed. I think he was going full speed all the time.

Q. From the lights upon the 'Argyll' in your position what, if any, change did the 'Argyll' make in her course from the time you first saw the range lights until the collision?

A. *Well, the way it looked to me, the 'Argyll' put her helm hard a'starboard.

* This would immediately have brought her green light into view.

Q. When?

A. Well, when she answered this one whistle.

Q. Then what change did she make in her course after that, if she made any?

A. Then she put her helm hard a'port; and the way I think that happened was this, that the third mate answered that——” (Ap. 264-5).

* * * * *

“Mr. LILLICK. Q. You can state, Mr. Gibbs, what you saw her do and from those lights what she did do.

A. Well, it appeared to me that when I blowed that one whistle she was swinging to starboard.

Q. Could you tell whether she had commenced to swing to starboard before you blew that one whistle?

A. No, I think she was on her course at that time.

Q. When did she commence to swing to starboard, if she did?

A. Shortly after I blew that one blast of the whistle I noticed her range light begin to change, and that is why I ordered the man to put his helm hard a'port” (Ap. 265-6).

* * * * *

“Q. After you blew your one whistle you ported your helm, and she continued to swing on that port helm?

A. Yes.

Q. You say the ‘Argyll’ answered with one whistle?

A. One whistle.

Q. What did you do next?

A. Well, I seen the ‘Argyll’s’ range lights changing.

Q. The range lights changing?

A. Yes, and I told my man to put his helm to hard a'port.

Q. How were they changing? How could you tell the range lights were changing?

A. Well, they appeared to me they were changing.

Q. And it was by those range lights that you were judging that she was swinging?

A. Yes.

Q. Which way did you think she was swinging?

A. Well, I thought she was swinging to—I thought she was swinging a little to starboard.

Q. Then you at that time ordered your helm to hard a'port?

A. I still seen that range light, and I ordered him to put his helm hard a'port.

Q. From that time, from the swinging of the range lights you thought the 'Argyll' was swinging to starboard?

A. I thought she was swinging a little to starboard; it appeared that way to me.

Q. How long before the collision was it that you put your helm hard a'port?

A. It was about a minute and a half.

Q. How long was that after you had first put your helm to port?

A. It was about half a minute.

Q. Her bow was then swinging to starboard under her port helm with the engines working full speed ahead, going about 8 knots?

A. Yes, her engines were going full speed ahead.

Q. What was the next that you saw of the 'Argyll'?

A. The next thing I saw was a green light.

Q. How soon was that after you put your helm hard a'port?

A. That was about 25 or 30 seconds.

Q. How far distant was the 'Argyll' from you at that time?

A. About a quarter of a mile.

Q. How did she bear from you?

A. She was on our port bow.

Q. How much?

A. She was about 2 points on our port bow.

Q. *How soon after you saw the 'Argyll's' green light did you reverse full speed astern?*

A. *Right away.*

Q. That was about 25 seconds before the collision, 25 or 30 seconds before the collision?

A. *No, it was about a minute before the collision.*

Q. You have just stated that you saw the green light about 25 or 30 seconds before the collision?

A. No, I did not.

Q. How did you come to reverse full speed astern a minute before the collision?

A. Well, I knew there was going to be a collision or I was nearly certain of it" (Ap. 289-90).

* * * * *

"Q. When you reversed full speed astern, you had not at that time seen this green light?

A. *Yes, that is what made me reverse.*

Q. *By seeing the green light?*

A. Yes.

Q. How long was that, did you say, before the collision?

A. About a minute" (Ap. 295).

What a commentary it is, if Gibbs' and the lookout's version be true, upon the efficiency of the watch maintained on the "Gualala"! On the one hand, we have the deck officer positively stating that upon swinging to starboard from a S.E. course so as to pass the "Argyll", whose red light he had seen a point and a half on his own port bow, he suddenly saw, when the "Gualala" was headed S.S.W., the green light of the "Argyll" come into view two points on his own port bow, although it must have been visible long before, the appearance of which caused him to reverse the "Gualala" full speed astern a minute before the collision, during which period of reversing the green light must have remained in full view. On the other hand,

the lookout, stationed in the eyes so as to give him an unobstructed view ahead, whose special duty it was to observe and report lights and signals, never, at any time, saw the green light of the "Argyll". The inefficiency of such a watch cannot be better characterized than by the following from

The New York, 175 U. S 187; 44 L. ed. 126, 134:

"Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought to have heard. *This, unexplained, is conclusive evidence of a defective lookout.*" (Italics ours.)

The discrepancy between the testimony of Gibbs and the lookout cannot be explained.

And yet the District Court condemned the "Argyll" as solely in fault, without a word of criticism upon the navigation of the "Gualala", because the lookout of the former did not report to the bridge a change in the "Gualala's" course, made known to the "Argyll" by a port passing signal, and because the mate of the "Argyll" did not remain stationary upon the bridge, with his eye fixed upon the "Gualala", which, by maintaining her course as the rules of the road required, would have passed in safety, starboard to starboard, although the mate paced the bridge as customary, watching first over one bow and then over the other, and, when the one blast of the "Gualala's" whistle came, indicating that she was going to wrongfully attempt to cross the bow of the "Argyll", he did the two things which might have possibly avoided the impending collision, threw his helm to port and reversed, and indicated them by proper signals, both of which maneuvers have,

under similar circumstances, met with the approval of our highest admiralty authorities!

The facts did not justify the exonerating of the "Gualala" and the condemning of the "Argyll", but, on the contrary, the "Gualala" alone should have been held responsible for the collision. The "Gualala's" version of the collision is untenable, for the collision could not have so occurred. It was caused by the wrongful porting of the "Gualala" when approaching the "Argyll", starboard to starboard, and for her error, we respectfully submit, the "Gualala" should be held solely in fault.

We respectfully ask that the decree of the lower court be reversed with instructions to dismiss, with costs, the libels against appellant, and for such other and proper relief as this honorable court may deem meet and proper.

Dated, San Francisco,

November 2, 1914.

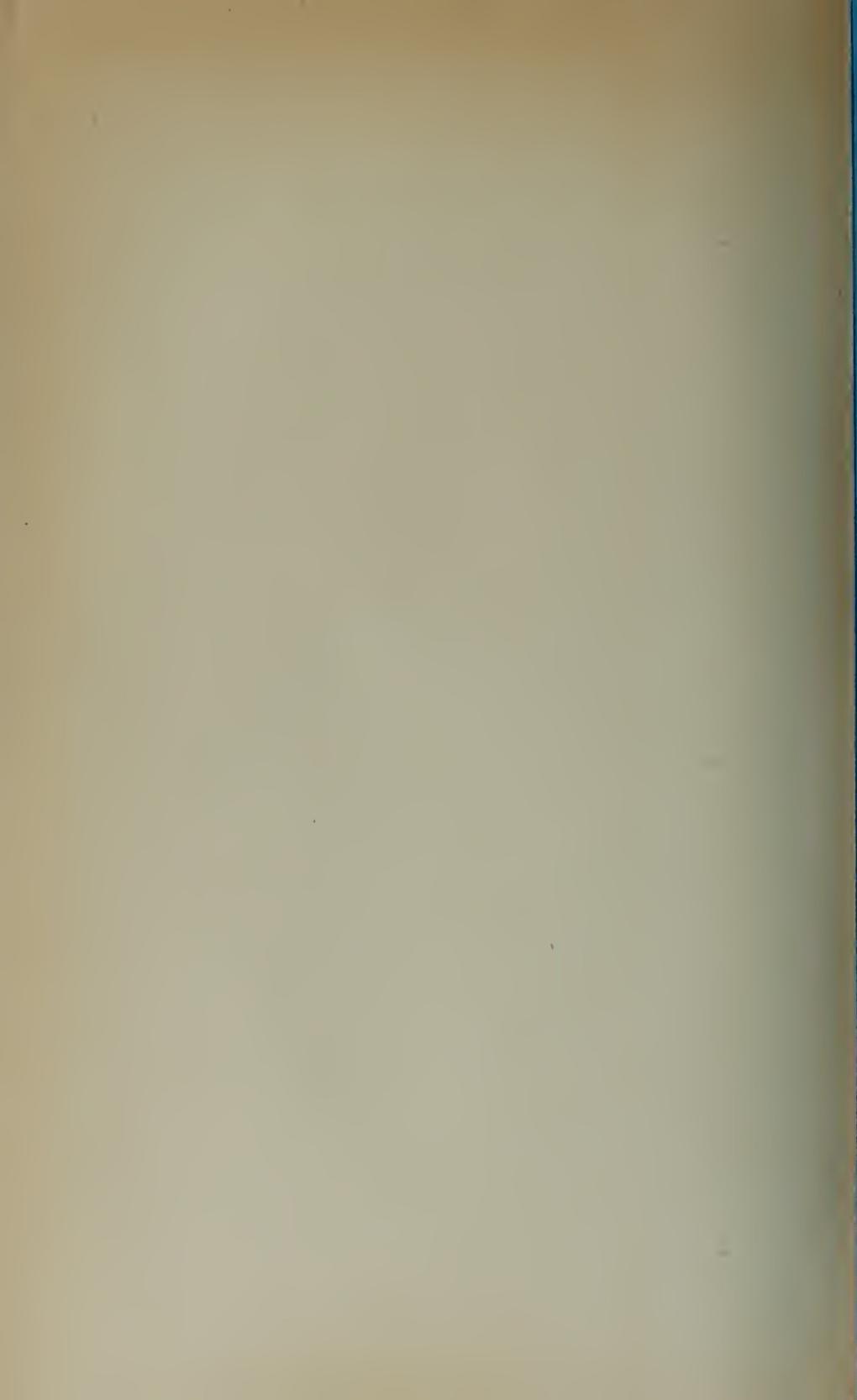
Respectfully submitted,

EDWARD J. McCUTCHEON,

IRA A. CAMPBELL,

McCUTCHEON, OLNEY & WILLARD,

Proctors for Appellant.



COPY

REBELANT'S EXHIBIT "A"

NW

NE

B

E

SE

1ST POSITION

2ND POSITION

3RD POSITION

4TH POSITION

5TH POSITION

6TH POSITION

7TH POSITION

8TH POSITION

9TH POSITION

10TH POSITION

11TH POSITION

12TH POSITION

13TH POSITION

14TH POSITION

15TH POSITION

16TH POSITION

17TH POSITION

18TH POSITION

19TH POSITION

20TH POSITION

21ST POSITION

22ND POSITION

23RD POSITION

24TH POSITION

25TH POSITION

26TH POSITION

27TH POSITION

28TH POSITION

29TH POSITION

30TH POSITION

31ST POSITION

32ND POSITION

33RD POSITION

34TH POSITION

35TH POSITION

36TH POSITION

37TH POSITION

38TH POSITION

39TH POSITION

40TH POSITION

41ST POSITION

42ND POSITION

43RD POSITION

44TH POSITION

45TH POSITION

46TH POSITION

47TH POSITION

48TH POSITION

49TH POSITION

50TH POSITION

51ST POSITION

52ND POSITION

53RD POSITION

54TH POSITION

55TH POSITION

56TH POSITION

57TH POSITION

VESSELS DRAWN TO SCALE
SHOWING ANGLE OF IMPACT
(APOSTLES PP. 149 ETC.)

ARGYLL

CLAYMINING EXHIBIT F
COPY

